

UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH DAKOTA

SOUTHERN DIVISION

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EUGENE J. LODERMEIER and
MERYLE E. LODERMEIER,

CIV 91-4148

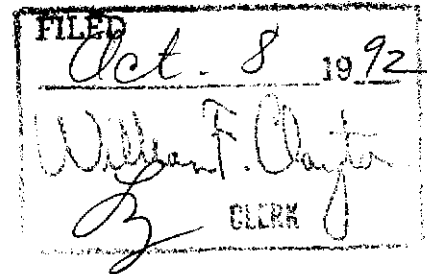
Plaintiffs,

-vs-

MEMORANDUM OPINION and
ORDER

SIOUX FALLS POLICE DEPARTMENT,
CITY OF SIOUX FALLS, STATE OF
SOUTH DAKOTA, ROGER
TELLINGHUISEN, MARK BARNETT,
DIANE BEST, COUNTY OF
MINNEHAHA, RICHARD HURD,
DAVID NELSON, JAMES IOSTY,
LANCE MATTSON, RICHARD
SEIVERT, RUSSELL PRINCE,
GERALD FOLKERTS, CARL
EDMUNDS, TERRY SATTERLEE,
RANDALL FLOOD, DEAN JOHNSON,
KELO-TV, KDLT-TV, KSFY-TV,
SIOUX FALLS ARGUS LEADER,
JANET LIVELY, STEVE
ERPENBACH, TODD NELSON,
VALERIE ARMSTRONG, et al.,
in their individual and
official capacities,

Defendants.



Plaintiffs are the parents of Gene V. Lodermeier, who was convicted of criminal offenses and who brought a § 1983 action relating to his conviction. CIV 91-4147. Plaintiffs, acting pro se, also bring this action under § 1983, naming many of the same defendants as their son has in his action and many of their allegations closely parallel the claims made by their

1 son in his action. Plaintiff Meryle E. Lodermeier was
2 convicted of making a false report to law officers on December
3 12, 1989. Plaintiffs seek a judgment permanently enjoining
4 the defendants from engaging in the alleged unlawful practices
5 complained of, to declare the judgment of conviction against
6 plaintiff Meryle Lodermeier invalid, and an award of \$4
7 million in damages.

8 All of the defendants have filed motions to dismiss or
9 for summary judgment on a wide variety of grounds. On June 9,
10 1992, I granted dismissal of certain defendants in this
11 action.¹ Those defendants who were granted dismissal include:
12 KELO-TV, KDLT-TV, KSFY-TV, Sioux Falls Argus Leader, Janet
13 Lively, Steve Erpenbach, Todd Nelson and Valerie Armstrong.
14 The other defendants' motions to dismiss were based in part
15 upon matters outside of the pleadings, so I ordered that they
16 be treated as motions for summary judgment under Rule 56 of
17 the Federal Rules of Civil Procedure. Plaintiffs were granted
18 until July 1, 1992 to answer these defendants' motions, and to
19 respond to requests for Rule 11 sanctions made by certain
20 defendants.

21 Plaintiffs have responded to motions made by certain
22

23 ¹I also denied plaintiffs' request that Meryle
24 Lodermeier's conviction be declared invalid. This denial was
25 based on failure to exhaust in state court. See Lodermeier v.
26 Sioux Falls Police Dep't, et al., CIV 91-4148, Memorandum
Opinion and Order (June 9, 1992).

1 defendants but have failed to respond to motions made by
2 defendants Hurd, Minnehaha County, David Nelson, and James
3 Iosty. The time for filing any response has expired. See
4 Rule 12 of the Federal Rules of Civil Procedure.

5 DISCUSSION

6 A pro se pleading asserting civil rights violations is to
7 be liberally construed.² *Miller v. Solem*, 728 F.2d 1020, 1023
8 (8th Cir. 1984), *cert denied*, 469 U.S. 841 (1984).
9 Furthermore, under the principles governing summary judgment,
10 the Court views the evidence in the light most favorable to
11 the non-moving party. *Id.* However, "only genuine issues of
12 material fact can defeat a motion for summary judgment."
13 *Myers v. Morris*, 810 F.2d 1437, 1444 (8th Cir. 1987), *cert.*
14 *denied*, 484 U.S. 828 (1987) (*quoting Kompare v. Stein*, 801 F.2d
15 883, 889 (7th Cir. 1986)) (emphasis original).

16 Defendant State of South Dakota

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18 Plaintiffs' complaint makes no allegation against the
19 State of South Dakota. In plaintiffs' responsive brief they
20 concede that the State of South Dakota is not defined as a
21 "person" within the meaning of § 1983, nor can it be held
22 liable as respondeat superior. It is clear that a State
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24 ² Pursuant to this standard, I have construed
25 plaintiffs' complaint to include a claim for relief under 42
26 U.S.C. § 1985.

1 cannot be sued in federal court under § 1983. *Will v.*
2 *Department of State Police*, 491 U.S. 58 (1989). Summary
3 judgement must be granted as to the State of South Dakota.
4 Defendants Roger Tellinghuisen, Mark Barnett and Diane Best

5 To establish an action under 42 U.S.C. § 1983, two
6 elements must be present: (1) the conduct complained of must
7 have deprived the plaintiff of rights, privileges, or
8 immunities secured by the Constitution or laws of the United
9 States, and (2) the conduct must have been committed by a
10 person acting under color of state law. 42 U.S.C. § 1983; *see*
11 *also Jones v. Gutschenritter*, 909 F.2d 1208, 1211 (8th Cir.
12 1990). The only allegations plaintiffs make against these
13 defendants is that they failed to take action during the "bad
14 faith" prosecution of plaintiffs' son. No only are no
15 allegations made that any of these defendants deprived
16 plaintiffs of any rights, it is clear that these defendants
17 did not deprive plaintiffs of any rights which would impose §
18 1983 liability. Summary judgment is granted as to defendants
19 Roger Tellinghuisen, Mark Barnett, and Diane Best.

20 Defendant David Nelson

21
22 Plaintiffs' only allegations against defendant David
23 Nelson is that he is the State's Attorney and has
24 administrative and active control of that office. Such action
25 is not enough to impose liability under § 1983. To impose
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1 liability on an individual such as Nelson, plaintiffs must
2 show that he "demonstrated deliberate indifference or tacit
3 authorization of the offensive acts by failing to take
4 remedial steps" to remedy those acts. *Wilson v. City of North*
5 *Little Rock*, 801 F.2d 316, 322 (8th Cir. 1986). Plaintiffs
6 have not alleged, nor have they shown, any personal
7 involvement by David Nelson in the activities of which they
8 complain.

9 Absolute Immunity

10 In a civil rights action a prosecutor does not have to
11 defend alleged prosecutorial misconduct if that misconduct
12 occurred in the discharge of the prosecutor's duties. *Myers*,
13 810 F.2d at 1446. A prosecutor who acts within the scope of
14 his duties is absolutely immune from § 1983 liability. *Imbler*
15 *v. Pachtman*, 424 U.S. 409, 431-32 (1976); see also *Snelling v.*
16 *Westhoff*, Nos. 92-1067/92-1208, 1992 U.S. App. LEXIS 17610, at
17 *2 (8th Cir. Aug. 3, 1992) (per curiam). Even allegations
18 that a prosecutor knowingly presented false testimony are
19 insufficient to defeat a prosecutor's absolute immunity.
20 *Myers*, 810 F.2d at 1446.

21
22 Plaintiffs assert that all of the acts performed by
23 defendant prosecutors which were investigative in nature fail
24 to qualify for absolute immunity. Such a broad assertion
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1 would unduly restrict a prosecutor's actions.

2 "[C]onfering with potential witnesses regarding
3 their knowledge of underlying events is plainly a
4 part of a prosecutor's preparation of his case and
5 therefore immune. . . . Not all of an advocate's
6 work is done in the courtroom. For a lawyer to
7 properly try a case, he must confer with witnesses,
8 and conduct some of his own factual investigation."
9 *Myers*, 810 F.2d at 1450 (citations and internal quotations
10 omitted). As *Myers* illustrates, part of the duties of a
11 prosecutor necessarily entail an investigative function and
12 are entitled to absolute immunity.

13 It is true that the suppression of exculpatory evidence
14 is beyond the scope of a prosecutor's duties and such action
15 is not entitled to absolute immunity, or any type of immunity.
16 *Imbler*, 424 U.S. at 431 n.34. However, plaintiffs' claims
17 that exculpatory information relating to Meryle Lodermeier's
18 charges was suppressed are merely conclusory and devoid of any
19 factual support. Moreover, plaintiffs have failed to present
20 any facts showing that the prosecutors did not perform their
21 duties in "good faith" and with "objective legal
22 reasonableness". Plaintiffs' claims as to defendants Roger
23 Tellinghuisen, Mark Barnett, Diane Best, David Nelson and
24 James Iosty must be dismissed.

25 Conspiracy

26 In their complaint plaintiffs allege that various
defendants were involved in a conspiracy to deprive them of
their rights. To sustain a conspiracy claim, plaintiffs must

1 allege that defendants directed themselves toward an
2 unconstitutional action by virtue of a mutual understanding,
3 and provide some facts suggesting such a "meeting of the
4 minds." *Smith v. Bacon*, 699 F.2d 434, 436 (8th Cir. 1983).
5 The fact that various people were engaged in the investigation
6 and reporting of suspected criminal activity does not create
7 a conspiracy. *Myers*, 810 F.2d at 1454. There must be "a
8 genuine factual issue of concerted activity toward an unlawful
9 objective." *Id.* Plaintiffs have not pointed to any facts
10 which would show that the defendants "reached an
11 understanding" to violate their rights. *See Adickes v. S.H.*
12 *Kress & Co.*, 398 U.S. 144, 152 (1970). Plaintiffs have not
13 alleged with "sufficient particularity" nor demonstrated with
14 "specific material facts" that the defendants reached an
15 "agreement and conspired together to deprive plaintiff[s] of
16 a federal right." *Gometz v. Culwell*, 850 F.2d 461 (8th Cir.
17 1988) (citation omitted). Plaintiffs' allegations of a
18 conspiracy are merely conclusory.

20 Plaintiffs' complaint makes several allegations that
21 various defendants "conspired" to perform assorted acts.
22 However, the complaint and other materials submitted by
23 plaintiffs are devoid of any factual allegations which would
24 suggest a "meeting of the minds". Summary judgment is granted
25 to all defendants as to plaintiffs' conspiracy claim. Having
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1 concluded that there was no conspiracy, I now examine whether
2 there is any individual liability for the acts of the police
3 officers named as defendants.

4 Defendant Police Officers - Terry Satterlee, Richard Seivert,
5 Gerald Folkerts, Russell Prince, Carl Edmunds and Lance
6 Mattson

7 Plaintiffs' response to the defendant police officers'
8 motion to dismiss is styled more in the nature of an attack on
9 Meryle Lodermeier's conviction. Having ruled that plaintiffs
10 have failed to exhaust state court remedies, I will ignore
11 those arguments. There are no facts to support plaintiffs'
12 allegations that Eugene Lodermeier "has been inexcusably and
13 improperly named instead of his son on judicial proceeding
14 [sic] and criminal charges and in highly publicized defamatory
15 newscasts." These are merely conclusory allegations and
16 devoid of any factual support. The other allegations
17 plaintiffs make refer to their son's prosecution, and as such
18 are not claims which they can recover on under § 1983.

19 Defendants Minnehaha County, City of Sioux Falls and Sioux
20 Falls Police Department

21 Having determined that there is no liability for the acts
22 of their employees, there can be no liability of defendants
23 Minnehaha County, City of Sioux Falls, or Sioux Falls Police
24 Department. In addition, such entities cannot be held liable
25 under § 1983 on a theory of respondeat superior. *Williams v.*
26 *Butler*, 863 F.2d 1398, 1400 (8th Cir. 1988), *cert denied sub*

1 *nom.*, 492 U.S. 906 (1989). To impose liability it must be
2 shown that the challenged actions amounted to a custom. *Id.*
3 Again, plaintiffs' allegations in this regard are merely
4 conclusory and devoid of any factual support.

5 Defendant Richard Hurd

6 Plaintiffs' complaint, paragraph 38, alleges that:

7 [d]efendant Hurd presided over plaintiff Meryle
8 Lodermeier's trial proceedings after previously
9 making unfounded statements and harsh remarks
10 against her based on ex parte communications.
11 Notwithstanding Hurd's distinct bias he failed to
12 disqualify himself. . . . Hurd denied plaintiff
13 Meryle Lodermeier a fair trial, abused his
14 discretion, and himself engaged in and allowed
15 other defendants to exercise abuse of process and
16 deprive plaintiff Meryle Lodermeier of her
17 constitutional rights.

18 However, it is clear from court records submitted by defendant
19 Hurd that Judge Hurd's only contact with plaintiff Meryle
20 Lodermeier's case was to conduct the preliminary hearing at
21 which she was bound over for jury trial.

22 Even assuming *arguendo* that defendant Hurd did preside
23 over Meryle Lodermeier's trial, he would have done so in his
24 judicial capacity and he would clearly have had jurisdiction
25 to do so. It necessarily follows that he has absolute
26 immunity from liability in this action. *Mireles v. Waco*, 112
S.Ct. 286 (1991); *Myers v. Vogel*, 960 F.2d 750 (8th Cir.
1992). Summary judgment must be granted as to defendant
Richard Hurd.

1 Defendants Dean Johnson and Randall Flood

2 Plaintiffs have alleged that Dean Johnson and Randall
3 Flood conspired with various defendants. Having ruled that
4 plaintiffs' allegations are merely conclusory as to any
5 conspiracy theory, plaintiffs' claims as to any involvement by
6 defendants Dean Johnson and Randall Flood in a conspiracy must
7 fail.

8 Plaintiffs allege that Dean Johnson conspired with
9 Russell Prince to "fraudulently prosecute and defame
10 plaintiffs." However, this is directly contradicted by an
11 affidavit submitted by plaintiffs' son in his appeal to the
12 South Dakota Supreme Court (as well as in his § 1983 action
13 in this Court, CIV 91-4147) which stated that defendants
14 Russell Prince and Dean Johnson have not spoken for over 12
15 years. *State v. Lodermeier*, 481 N.W.2d 614, 627 n.9 (S.D.
16 1992). Plaintiffs' other allegations against Dean Johnson
17 fail because neither element for recovery under § 1983 has
18 been met. There has been no showing or allegation that Dean
19 Johnson's conduct deprived plaintiffs of any protectible
20 interest under § 1983 or that Dean Johnson acted under color
21 of state law.

22 Plaintiffs' only allegation against Randall Flood is that
23 he conspired with other defendants "to commit perjury and
24 fraudulently prosecute plaintiff Meryle Lodermeier". Apart
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1 from the fact that plaintiffs' conspiracy claim lacks merit,
2 even when plaintiffs' claim is liberally construed their
3 allegations against Randall Flood are conclusory and devoid of
4 any factual support. Plaintiffs' allegations would fail even
5 if factual support existed. Witnesses in judicial proceedings
6 are absolutely immune from civil liability under § 1983 based
7 on their testimony, even if they knowingly gave perjured
8 testimony. *Briscoe v. Lahue*, 460 U.S. 325 (1983).

9 Defendant Flood has not joined in or made any pending motion
10 for summary judgment, but the Court has concluded that
11 Plaintiffs' claims against him must fail. The Court therefor
12 concludes that summary judgment must be granted as to him for
13 the reasons stated herein.

14 Rule 11 Sanctions

15 Various defendants have requested Rule 11 sanctions
16 against the plaintiffs. Those requests will be denied.

17 Therefore,

18 Upon the record herein,

19 IT IS ORDERED:

20 (1) That the motion for summary judgment made by
21 defendants State of South Dakota, Roger Tellinghuisen, Mark
22 Barnett and Diane Best, Doc. 16, is granted.

23 (2) That the motion to dismiss made by defendants
24 Minnehaha County, David Nelson and James Iosty, Doc. 33, has
25

1 been treated as a motion for summary judgment and is granted.

2 (3) That the motion to dismiss of defendants City of
3 Sioux Falls, Sioux Falls Police Department, Russell Prince,
4 Gerald Folkerts, Carl Edmunds, Terry Satterlee, Richard
5 Seivert and Lance Mattson, Doc. 3, has been treated as a
6 motion for summary judgment and is granted.

7 (4) That the motion for summary judgment made by
8 defendant Richard Hurd, Doc. 34, is granted.

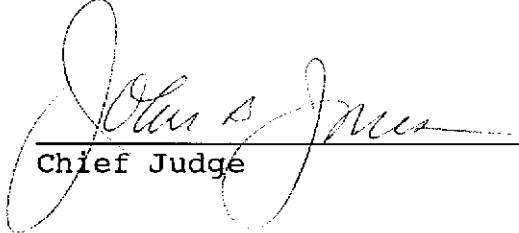
9 (5) That the motion for summary judgment made by
10 defendant Dean Johnson, Doc. 40, is granted.

11 (6) That plaintiffs' complaint against defendant Randall
12 Flood is dismissed *sua sponte*.

13 7) That the Clerk of Courts will enter judgment for the
14 defendants and against plaintiffs on all issues under
15 plaintiffs' complaint.

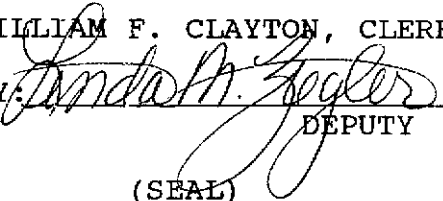
16 Dated this 8th day of October, 1992.

17 BY THE COURT:

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20 
Chief Judge

21 ATTEST:

22 WILLIAM F. CLAYTON, CLERK

23 BY: 
24 DEPUTY

25 (SEAL)